

1 **UNITED STATES DISTRICT COURT**

2 **DISTRICT OF NEVADA**

3 BANK OF NEW YORK MELLON,

Case No.: 2:17-cv-00065-APG-BNW

4 Plaintiff

**Order Granting Defendant Pacific's
Motion to Dismiss and Setting Deadline for
Filing an Amended Complaint**

5 v.

6 BLACKROSE INVESTMENTS, LLC, et al.,

[ECF No. 36]

7 Defendants

8 Plaintiff Bank of New York Mellon (BONY) sues to determine whether its deed of trust
9 still encumbers property located at 2961 Juniper Hills #101 in Las Vegas, Nevada, following a
10 non-judicial foreclosure sale conducted by the homeowners association (HOA), defendant
11 Pacific Harbors-Stonegate Property Owners Association (Pacific). Pacific moves to dismiss the
12 claims against it, arguing BONY's claims are time-barred and fail to state a claim. BONY
13 opposes dismissal and alternatively requests leave to amend.

14 The parties are familiar with the facts, and I will not repeat them here except where
15 necessary. I deny Pacific's motion to dismiss based on the statute of limitations because
16 BONY's claims against Pacific are timely. I grant Pacific's motion to dismiss the declaratory
17 relief claim's due process allegations with prejudice. I grant Pacific's motion to dismiss it from
18 the declaratory relief claim's other allegations because BONY has not plausibly alleged a basis
19 to set aside the sale. I grant Pacific's motion to dismiss BONY's claims for wrongful foreclosure
20 and breach of a duty of good faith under Nevada Revised Statutes § 116.1113 because BONY
21 has not adequately alleged what Pacific did that was wrongful or how it breached a duty of good
22 faith in light of BONY's allegations that it validly tendered the superpriority amount and
23 Pacific's agent accepted that tender. Finally, I grant in part Pacific's motion to dismiss BONY's

1 claim under the Nevada Deceptive Trade Practices Act (NDTPA) because some allegations refer
2 to the sale of goods and services, which is not at issue here. However, I deny Pacific's motion as
3 to other provisions of the NDTPA because those statutory sections may apply to real estate
4 transactions and Pacific has not shown BONY cannot assert a claim under those provisions.

5 **I. ANALYSIS**

6 **A. Statute of Limitations**

7 "A claim may be dismissed as untimely pursuant to a 12(b)(6) motion only when the
8 running of the statute of limitations is apparent on the face of the complaint." *United States ex*
9 *rel. Air Control Techs., Inc. v. Pre Con Indus., Inc.*, 720 F.3d 1174, 1178 (9th Cir. 2013)
10 (alteration and quotation omitted). A limitations period begins to run "from the day the cause of
11 action accrued." *Clark v. Robison*, 944 P.2d 788, 789 (Nev. 1997). A cause of action generally
12 accrues "when the wrong occurs and a party sustains injuries for which relief could be sought."
13 *Petersen v. Bruen*, 792 P.2d 18, 20 (Nev. 1990); *see also State ex rel. Dep't of Transp. v. Pub.*
14 *Emps.' Ret. Sys. of Nev.*, 83 P.3d 815, 817 (Nev. 2004) (en banc) ("A cause of action 'accrues'
15 when a suit may be maintained thereon." (quotation omitted)). Nevada has adopted the
16 discovery rule, and thus time limits generally "do not commence and the cause of action does not
17 'accrue' until the aggrieved party knew, or reasonably should have known, of the facts giving
18 rise to the damage or injury." *G & H Assocs. v. Ernest W. Hahn, Inc.*, 934 P.2d 229, 233 (Nev.
19 1997).

20 Pacific argues BONY's claims are untimely because they are subject to either a 45- or
21 60-day limitation period under Nevada Revised Statutes § 107.080, but it provides no authority
22 for that proposition. Section 107.080 refers to foreclosures of deeds of trust, not HOA liens.
23 Nev. Rev. Stat. § 107.080(1).

1 Rather, the four-year catchall limitation period in Nevada Revised Statutes § 11.220
2 applies to claims brought by a lienholder like BONY seeking to determine whether an HOA sale
3 extinguished its deed of trust. *See Bank of Am., N.A. v. Country Garden Owners Ass’n*, No. 2:17-
4 cv-01850-APG-CWH, 2018 WL 1336721, at *2 (D. Nev. Mar. 14, 2018). BONY’s claims for
5 wrongful foreclosure and breach of § 116.1113 are governed by three or four-year limitations
6 periods. *See Bank of New York for Certificateholders of CWALT, Inc., Alternative Loan Tr.*
7 *2006-OA16, Mortg. Pass-Through Certificates, Series 2006-OA16 v. Foothills at MacDonald*
8 *Ranch Master Ass’n*, 329 F. Supp. 3d 1221, 1234 (D. Nev. 2018); *Nationstar Mortg. LLC v.*
9 *Amber Hills II Homeowners Ass’n*, No. 2:15-cv-01433-APG-CWH, 2016 WL 1298108, at *5 (D.
10 Nev. Mar. 31, 2016).

11 The HOA sale was conducted on September 9, 2014, and the deed upon sale was
12 recorded on September 19, 2014. ECF No. 1 at 6. BONY filed this lawsuit on January 6, 2017.
13 Thus, even using the earlier date of the HOA sale, and even considering a three-year limitation
14 period, BONY’s claims are timely. Accordingly, I deny Pacific’s motion to dismiss based on the
15 statute of limitations.

16 **B. Failure to State a Claim**

17 In considering a motion to dismiss, “all well-pleaded allegations of material fact are taken
18 as true and construed in a light most favorable to the non-moving party.” *Wyler Summit P’ship v.*
19 *Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). However, I do not assume the truth
20 of legal conclusions merely because they are cast in the form of factual allegations. *See Clegg v.*
21 *Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). A plaintiff must make sufficient
22 factual allegations to establish a plausible entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550
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1 U.S. 544, 556 (2007). Such allegations must amount to “more than labels and conclusions, [or] a
2 formulaic recitation of the elements of a cause of action.” *Id.* at 555.

3 1. Declaratory Relief

4 *a. Due Process*

5 BONY’s first claim seeks a declaration that the deed of trust was not extinguished by the
6 HOA foreclosure sale. Included within that claim are allegations that Chapter 116 as it existed at
7 the time of the sale violated BONY’s due process rights. Pacific moves to dismiss the due
8 process allegations. To the extent BONY’s due process allegations are based on the reasoning of
9 *Bourne Valley Court Trust v. Wells Fargo Bank, NA*, 832 F.3d 1154 (9th Cir. 2016) or the
10 content of the foreclosure notices, I grant Pacific’s motion. *See Bank of Am., N.A. v. Arlington W.*
11 *Twilight Homeowners Ass’n*, 920 F.3d 620, 623-24 (9th Cir. 2019) (citing *SFR Invs. Pool 1, LLC*
12 *v. Bank of N.Y. Mellon*, 422 P.3d 1248 (Nev. 2018) (en banc)); *Nationstar Mortg. LLC v. Amber*
13 *Hills II Homeowners Ass’n*, No. 2:15-cv-01433-APG-CWH, 2016 WL 1298108, at *6-9 (D.
14 Nev. Mar. 31, 2016).

15 BONY also argues that if the sale extinguished the deed of trust, that would violate
16 BONY’s due process rights as applied because it tendered the superpriority amount and Pacific’s
17 agent accepted the tender. But accepting BONY’s allegations as true, if it properly tendered the
18 superpriority amount, then its deed of trust was preserved by operation of law, so it has not been
19 harmed, and thus there is no due process violation. *See Bank of Am., N.A. v. SFR Investments*
20 *Pool 1, LLC*, 427 P.3d 113, 121 (Nev. 2018) (en banc). If BONY did not properly tender, then
21 there is no due process violation because BONY alleges it had notice of the sale, notice of the
22 superpriority amount, and an opportunity to cure through payment to the foreclosure agent. *See*
23 *Conner v. City of Santa Ana*, 897 F.2d 1487, 1492 (9th Cir. 1990) (citing *Mathews v. Eldridge*,

1 424 U.S. 319, 333 (1976)) (“The fundamental requirements of procedural Due Process are notice
2 and an opportunity to be heard . . .”). Either way, BONY has no remaining plausible due
3 process allegations, so I dismiss those allegations with prejudice.

4 *b. Proper Party*

5 Pacific contends it is not a proper party to BONY’s declaratory relief claim because it
6 does not claim an interest in the property. BONY responds that if the HOA sale is set aside, then
7 the HOA’s lien will be restored, so Pacific is a proper party to the declaratory relief claim.

8 Pacific would be a proper party if there was a basis to set aside the sale because its
9 superpriority lien potentially would be reinstated. *See Nationstar Mortg., LLC v. Sundance*
10 *Homeowners Ass’n, Inc.*, No. 2:15-cv-01310-APG-GWF, 2016 WL 1259391, at *3 (D. Nev.
11 Mar. 30, 2016). But BONY does not identify in its opposition any viable allegations in the
12 complaint that would provide a basis to set aside the sale.¹ I therefore grant Pacific’s motion to
13 dismiss it from the declaratory relief claim, without prejudice to BONY amending its complaint
14 to add facts providing a basis to set aside the sale, if such facts exist. *See Sonoma Cty. Ass’n of*
15 *Retired Employees v. Sonoma Cty.*, 708 F.3d 1109, 1118 (9th Cir. 2013) (“As a general rule,
16 [d]ismissal without leave to amend is improper unless it is clear . . . that the complaint could not
17 be saved by any amendment.” (quotation omitted)).

18 **B. Section 116.1113**

19 BONY asserts a claim against Pacific under § 116.1113, which imposes a duty of good
20 faith in the “performance or enforcement” of “[e]very contract or duty governed by” Chapter
21 116. Pacific contends this claim cannot be based on the content of the HOA’s foreclosure
22

23 ¹ If BONY prevails on its tender allegations, the consequence will be that the buyer at the HOA
sale took the property subject to the deed of trust. *See Bank of Am., N.A.*, 427 P.3d at 121. The
sale thus will not be set aside even if BONY wins on tender.

1 notices because those notices complied with applicable law at the time of the sale. Pacific
2 asserts that BONY does not otherwise identify what contractual or statutory duty Pacific violated
3 to support this claim. BONY responds that Pacific sold the property for an inadequate price and
4 the sale was infected by fraud, oppression, or unfairness because BONY tendered the
5 superpriority amount.

6 I grant Pacific's motion because BONY has not identified what statutory or contractual
7 duty Pacific breached. The Supreme Court of Nevada has rejected the proposition that HOAs
8 had to identify the superpriority amount in the foreclosure notices under the statutory scheme as
9 it existed at the time of this sale. *See SFR Investments Pool 1 v. U.S. Bank*, 334 P.3d 408, 418
10 (Nev. 2014) (en banc). That court also has rejected the notion that an HOA has a duty to obtain
11 the highest price it could when conducting an HOA foreclosure sale. *Nationstar Mortg., LLC v.*
12 *Saticoy Bay LLC Series 2227 Shadow Canyon*, 405 P.3d 641, 644-45 (Nev. 2017). Thus,
13 BONY's contention that the HOA sold the property for a grossly inadequate price does not
14 amount to a breach of good faith under Chapter 116. Moreover, if BONY prevails on tender,
15 then BONY's deed of trust will not be extinguished, so foreclosure of the HOA's subpriority lien
16 will not damage BONY. If BONY does not prevail on tender, then BONY does not explain what
17 duty Pacific violated that caused damages to BONY. Rather, BONY's lien will be extinguished
18 because it did not properly tender. I therefore grant Pacific's motion to dismiss this claim, with
19 leave to amend.

20 C. Wrongful Foreclosure

21 BONY asserts a wrongful foreclosure claim against Pacific. Pacific argues this claim
22 fails because the former property owner was in default on the HOA assessments so the
23 foreclosure of the HOA's lien was not wrongful. Pacific also argues BONY lacks standing to

1 assert a wrongful foreclosure claim because it is not a trustor or mortgagor. Finally, Pacific
2 contends a wrongful foreclosure claim cannot be based on general allegations of unfairness, and
3 BONY has not adequately alleged why the foreclosure sale was wrongful.

4 BONY responds that Pacific's conduct was wrongful if it allegedly foreclosed on a
5 superpriority lien despite BONY's tender of the superpriority amount because that portion of the
6 HOA's lien was no longer in default. BONY contends it has standing to assert a wrongful
7 foreclosure claim as a junior lienholder whose interest may be extinguished by the foreclosure
8 sale.

9 BONY has adequately alleged it has standing to assert a wrongful foreclosure claim as a
10 junior lienholder whose interest would be extinguished by the HOA foreclosure sale and who
11 alleges that the superpriority lien was not in default. *See Bank of Am., N.A. v. Operture, Inc.*, No.
12 2:16-cv01692-APG-GWF, 2018 WL 3242679, at *3 (D. Nev. July 2, 2018). However, for the
13 same reasons as BONY's § 116.1113 claim, BONY has not adequately alleged what is wrongful
14 about the sale or how BONY has been damaged. I therefore grant Pacific's motion as to this
15 claim, with leave to amend.

16 **D. NDTPA**

17 BONY asserts that Pacific engaged in deceptive trade practices because it (1) falsely
18 represented the amount of the superpriority lien in the foreclosure notices and (2) "falsely
19 asserted the information contained in the recitals in the foreclosure deed." ECF No. 1 at 14.
20 BONY also alleges that recording the foreclosure notices violated Nevada Revised Statutes
21 §§ 598.0915(15), 598.092(8), and 598.0923(2)-(3). *Id.*

22 Pacific argues BONY's NDTPA claim fails because BONY is a sophisticated lending
23 institution, not a customer; BONY does not allege a transaction involving consumer goods or

1 services and the NDTPA does not apply to real estate transactions; and BONY was not a party to
2 a transaction covered by the NDTPA. BONY responds that its claim is based on the sale of
3 goods and services to the original borrower or lender because the HOA provides services to
4 homeowners and lenders by enforcing the Covenants, Conditions, and Restrictions (CC&Rs) and
5 maintaining the neighborhood, in exchange for which the homeowners pay HOA assessments
6 and lenders make loans to homebuyers in the community.

7 Nevada Revised Statutes § 41.600 creates a cause of action for a victim of “consumer
8 fraud,” which includes deceptive trade practices identified in § 598.0915 to § 598.0925.
9 BONY’s complaint relies on two statutory sections that apply to deceptive practices related to
10 the sale or lease of goods or services. Nev. Rev. Stat. § 598.0923(2) (making it a deceptive
11 practice to “knowingly . . . [f]ail[] to disclose a material fact in connection with the sale or lease
12 of goods or services”); *id.* § 598.0923(3) (making it a deceptive practice to “knowingly . . .
13 “[v]iolate[] a state or federal statute or regulation relating to the sale or lease of goods or
14 services”). Because an HOA foreclosure sale is the sale of real estate, not goods or services,
15 these sections have no application in this context. *See Dowers v. Nationstar Mortg., LLC*, 852
16 F.3d 964, 972 (9th Cir. 2017) (“predicting that the Supreme Court of Nevada would hold that
17 real estate loans do not fall within the [NDTPA]” because the statute “governs transactions
18 relating to goods and services”); *Bank of New York Mellon v. Log Cabin Manor Homeowners*
19 *Ass’n*, 362 F. Supp. 3d 930, 939 (D. Nev. 2019); *The Bank of New York Mellon fka The Bank of*
20 *New York v. Cape Jasmine CT Tr.*, No. 2:16-cv-00248-JAD-GWF, 2016 WL 3511253, at *4-5
21 (D. Nev. June 27, 2016). I therefore dismiss these allegations with prejudice.

22 However, other sections of Chapter 598 are not necessarily limited to transactions
23 relating to the sale or lease of goods or services. *See Abernathy v. Cont’l Serv. Grp., Inc.*, No.

1 2:17-cv-00636-APG-NJK, 2018 WL 3370524, at *5 (D. Nev. July 9, 2018) (citing *Cape Jasmine*
2 *CT Tr.*, 2016 WL 3511253, at *4-5). As relevant here, § 598.092(8) makes it a deceptive trade
3 practice to “[k]nowingly misrepresent[] the legal rights, obligations or remedies of a party to a
4 transaction.” And § 598.0915(15) makes it a deceptive trade practice to “[k]nowingly make[]
5 any other false representation in a transaction.”² Because these two sections refer to a
6 “transaction,” rather than the sale or lease of goods or services, Pacific has not established that
7 these sections could not apply to a real estate transaction like an HOA foreclosure sale.

8 Pacific contends, however, that BONY is not a “consumer” who can assert a claim under
9 § 41.600 because it is a sophisticated lender and it is not a party to a transaction with Pacific.
10 BONY does not specifically respond to these arguments, instead arguing its general theory that
11 the HOA provides services to homeowners and lenders by enforcing the CC&Rs and in exchange
12 the homeowners pay HOA assessments.

13 Section 41.600’s plain language does not limit consumer fraud claims to unsophisticated
14 plaintiffs or to a party to the transaction in which the deceptive trade practice occurs. Rather,
15 § 41.600 permits “any person who is a victim of consumer fraud” to bring suit. *See Del Webb*
16 *Communities, Inc. v. Partington*, 652 F.3d 1145, 1152 (9th Cir. 2011) (“NRS 41.600(2) defines
17 the kinds of actions that constitute ‘consumer fraud’ not by referring to a certain type of victim,
18 but by cross-referencing other NRS sections defining deceptive trade practices and other
19 offenses.”); *S. Serv. Corp. v. Excel Bldg. Servs., Inc.*, 617 F. Supp. 2d 1097, 1099 (D. Nev. 2007)
20 (holding a business competitor may be a “victim of consumer fraud” under the NDTPA).
21 Additionally, it defines consumer fraud by reference to deceptive practices set forth in other
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23 ² In *Dowers*, the Ninth Circuit could not determine what statutory section of the NDTPA the
plaintiffs claimed the defendants violated, and it did not specifically address the statutory
sections that do not refer to “goods and services.” 852 F.3d at 972.

1 statutory sections. It is not apparent that each of those statutory sections requires the plaintiff to
2 have been a party to the transaction in which the false representation was made to be a victim of
3 the fraud. To the contrary, “the role of an individual in a transaction is irrelevant so long they
4 are a ‘victim of consumer fraud.’” *Del Webb Communities, Inc.*, 652 F.3d at 1152. “[T]o be a
5 victim under this statute, the plaintiff need only have been ‘directly harmed’ by the defendant.”
6 *Id.* at 1153. I therefore deny Pacific’s motion.

7 **II. CONCLUSION**

8 IT IS THEREFORE ORDERED that defendant Pacific Harbors-Stonegate Property
9 Owners Association’s motion to dismiss (ECF No. 36) is **GRANTED in part and DENIED in**
10 **part** as set forth in this order.

11 IT IS FURTHER ORDERED that plaintiff Bank of New York Mellon may file an
12 amended complaint on or before August 9, 2019.

13 DATED this 24th day of July, 2019.

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16 ANDREW P. GORDON
17 UNITED STATES DISTRICT JUDGE
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